

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

AFFYMETRIX, INC.,)	
)	
Plaintiff,)	
)	
v.)	C. A. No. 04-901 (JJF)
)	
ILLUMINA, INC.,)	REDACTED VERSION
)	
Defendant.)	
_____)	

PLAINTIFF AFFYMETRIX, INC.'S RESPONSES TO
DEFENDANT ILLUMINA, INC.'S MOTIONS *IN LIMINE*
RELATING TO PHASE ONE OF THE TRIAL

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**PLAINTIFF AFFYMETRIX, INC.'S RESPONSES TO
DEFENDANT ILLUMINA, INC.'S MOTIONS *IN LIMINE*
RELATING TO PHASE ONE OF THE TRIAL**

Affymetrix respectfully submits the following responses in opposition to the six motions *in limine* filed by Illumina.

Tab 1

AFFYMETRIX'S RESPONSE TO ILLUMINA'S MOTION IN LIMINE #1

Illumina's Motion *in Limine* #1 seeking to remove the Court's *Markman* Memorandum Opinion "in its entirety" should be denied. To be clear, Affymetrix does not wish to reargue claim construction before the jury. Even a cursory review of the *Markman* ruling makes clear that most of Affymetrix's proposed constructions were adopted and most of Illumina's rejected.¹ Affymetrix's experts have offered opinions based on the language of the constructions set forth by the Court.²

Affymetrix will, however, want to cross examine Illumina's witnesses if they are permitted to take positions at trial that have already been rejected by the Court. The Court's *Markman* determination left Illumina largely without noninfringement positions for a number of asserted claims. Rather than concede infringement, however, Illumina submitted reports from its infringement experts that offered opinions directly contrary to the Court's *Markman* findings. For example, in construing the term "biological polymers immobilized on a surface" in the '365 patent, the Court noted:

The dispute here is whether the construction should be limited to require that the polymers be chemically attached, and that they be *attached to a*

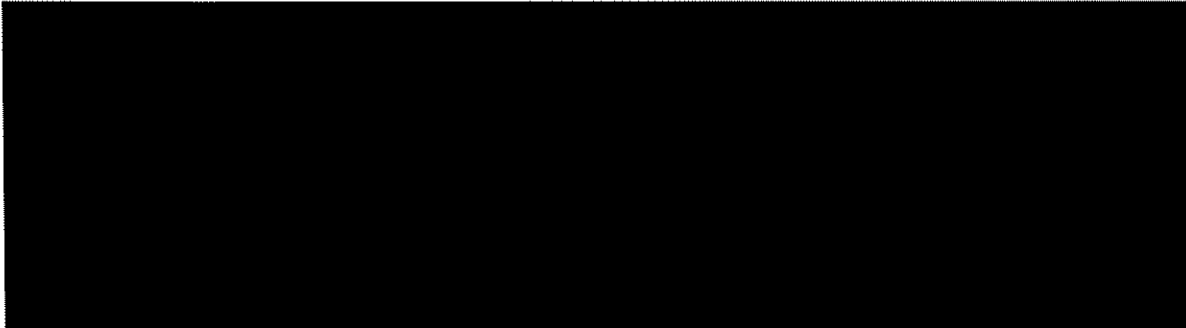
¹ Affymetrix reserves its right to appeal the Court's claim constructions to the extent the Court disagreed with Affymetrix's positions, but Affymetrix does not intend to reargue them in front of the jury.

²



single surface. The Court concludes that these limitations are not required.

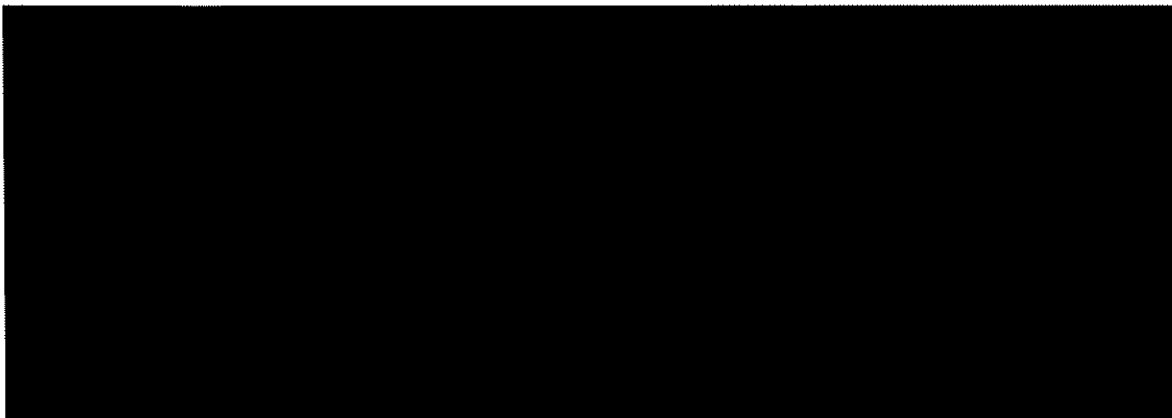
D.I. 324, *Markman* Memorandum Opinion, at 15-16 (emphasis added).

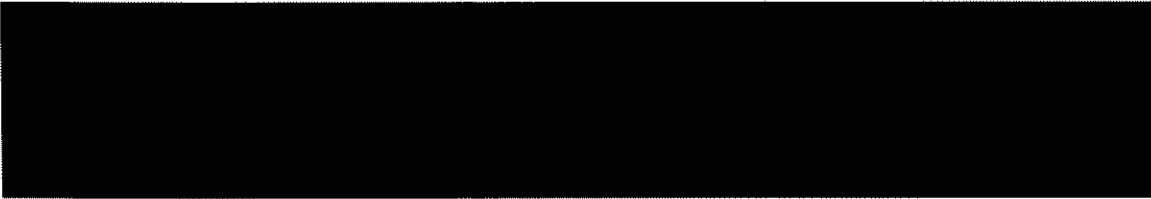


Similarly, in construing the term “said beads being coded with an encoding system,” in the ‘432 patent, the Court noted:

Subsequent to hybridization and identification of which polymer was attached to which bead, *the beads would have to be encoded in some way*, either by labeling them directly or *by recording their positions within an array of immobilized beads*.

D.I. 324, *Markman* Memorandum Opinion at 4-5 (emphasis added).





Illumina should not be allowed to put forward positions that the Court has already rejected.⁵ To the extent, however, that Illumina is permitted to do so, Affymetrix would be severely prejudiced if it could not cross examine Illumina's witnesses fully.

Moreover, despite Illumina's claim, there is no law to support Illumina's request to the have *Markman* Memorandum Opinion excluded "in its entirety" from the infringement trial. (Illumina Mot. *In Lim.* #1 at 3.). In the case Illumina cites, *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323, 1329 (Fed. Cir. 2005), *vacated on other grounds, eBay v. MercExchange, LLC.*, 126 S. Ct. 1837 (2006), the Federal Circuit simply stated:

We also agree with the district court that it was *not necessary* for the court *to include excerpts from its Markman order in the jury instructions*. A district court's *Markman* order is an explanation to the parties of the

4



⁵ See Affymetrix's Motion *in Limine* No. 7, §§ A and C to preclude certain opinions from Illumina's expert, Dr. Lusic.

reasoning behind its claim construction. The court's analysis *need not be part of the jury instructions*.

Id. at 1329 (emphasis added). The Court did not *preclude* the jury from ever hearing (or hearing a reference to) a court's *Markman* analysis as Illumina seeks to do here.

Similarly, in *Cytologix Corp., v. Ventana Medical Sys., Inc.*, 424 F.3d 1168, 1172 (Fed. Cir. 2005), the Federal Circuit recognized that it was "improper" to allow experts to opine on claim construction before the jury in the absence of a *Markman* ruling prior to trial. That situation is far removed from this case, where the Court has construed the claims well in advance of trial and the experts have submitted expert reports with the benefit of the Court's claim construction.⁶

The Court's *Markman* Memorandum Opinion – and particularly the Court's explicit recognition that *recording [the beads'] positions within an array of immobilized beads* is an encoding system – is relevant and probative. Accordingly, Affymetrix respectfully requests that Illumina's Motion *in Limine* #1 be denied.

⁶ Notably, Illumina's trial counsel in this case, when representing plaintiff OGT against Affymetrix in a patent infringement trial before this Court in 2000, used the Court's *Markman* analysis in that case in direct examination of OGT's principal technical expert witness. See, e.g., Exh. F, Oxford Gene Techs., Ltd. v. Affymetrix, Inc., No. 1:99-cv-00348-JJF, Trial Transcript, November 7, 2000 at pp. 357-58, 393 ("The correct construction had some elaboration I believe from the opinion. . . ."); 406-407 ("The Court has construed this portion of Claim 4. I'll just read that quote 'The Court construes this [quotation omitted].' And that's from the memorandum opinion.")

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REDACTED

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REDACTED

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REDACTED

F

00304

1 IN THE UNITED STATES DISTRICT COURT
2 IN AND FOR THE DISTRICT OF DELAWARE
3
4 OXFORD GENE TECHNOLOGY, LTD.,) VOLUME 2an English limited liability)
5 company,))
6 Plaintiff,)) Civil Action
7 v.) No. 99-348 (JJF))
8 AFFYMETRIX, INC.,)a Delaware corporation,)
9) Defendant.)
10
11
12 Wilmington, Delaware
13 Tuesday, November 7, 2000 9:33 a.m.
14
15 BEFORE: HONORABLE JOSEPH J. FARNAN, JR.,
16 United States District Court Judge
17
18 APPEARANCES:
19 RICHARD K. HERRMANN, ESQ. Blank Rome Comisky & McCauley, LLP
20 - and - ROBERT G. KRUPKA, ESQ. (Los Angeles, CA),
21 MARK A. PALS, ESQ. BRYAN S. HALES, ESQ., and
22 KENNETH H. BRIDGES, ESQ. Kirkland & Ellis
23 (Chicago, Illinois)
24 Counsel for Plaintiff

00357

1 test of the reasons for it, so I'm going to permit
2 him to testify if that's of choice of counsel, in
3 the first instance as to the opinion, and then I
4 assume you'll develop it or on cross-examination
5 you can challenge it.

6 MR. PALS: Yes, Your Honor.

7 THE COURT: So you can go ahead.

8 BY MR. PALS:

9 Q. What is your opinion as to whether
10 Affymetrix infringes the claims of the '637 patent
11 by its making of DNA array chips?

12 A. I have concluded that Affymetrix does
13 infringe.

14 Q. What is your opinion with respect to
15 whether the way in which Affymetrix's DNA array
16 chips are made infringes the '637 patent?

17 A. I conclude that that infringes the
18 patent.

19 Q. Have you, in fact, Dr. Dahlberg, reviewed
20 the Court's opinion with respect to the
21 construction of certain terms, of certain of the
22 claims of the '637 patent?

23 A. Yes, I have.

24 Q. And have you considered those, the

00358

1 Court's construction of those terms, in connection
2 with forming your opinions of infringement?

3 A. Yes, I have considered those rulings in
4 my conclusions.

5 Q. Have you reviewed any materials showing
6 how Affymetrix makes DNA arrays?

7 A. Yes, I considered quite a bit of
8 material.

9 Q. Would you please generally describe the
10 materials you considered?

11 A. Well, there are materials that are
12 internal documents that Affymetrix has, directing
13 how the manufacturing process should occur. From
14 all different levels of detail, most detail there
15 are something called the departmental operating
16 procedures which really tell the manufacture --
17 the person on the floor just how to put things
18 together and what to do.

19 I reviewed a number of those
20 documents. I've also reviewed more general type
21 of documents, still internal Affymetrix documents
22 that describe the process. Then I've also
23 reviewed documents that Affymetrix sends to its
24 customers and tells them how they have made the

00393

1 already discussed support material and discrete

2 cell locations.

3 The Court has also construed the
4 term segregating as "identifying or distinguishing
5 regions or locations on the support material where
6 the oligonucleotides of the array will be
7 synthesized."

8 I'm sorry, let me correct that. The
9 correct construction that had some elaboration I
10 believe from the opinion, but the correct
11 construction for segregating is, "identifying or
12 distinguishing regions or locations on the support
13 material."

14 Dr. Dahlberg, does Affymetrix use
15 step A of the '637 patent, Claim 1 of the '637
16 patent, in its method for making DNA array
17 products?

18 A. In my opinion, they do.

19 Q. How does Affymetrix perform this step?

20 A. Well, as I said before, they have to know
21 what oligonucleotide they want to make and then
22 they design a chip so that they know where that
23 oligonucleotide is to be made on the chip, so that
24 later on they can come back and, or the

00406

1 Q. Is it your opinion that all DNA array
2 products that Affymetrix makes and sells are made
3 according to the method of Claim 3 of the '637
4 patent?

5 A. Yes, it is.

6 Q. Turning your attention, Dr. Dahlberg, to
7 Claim 4 of the '637 patent, this claim includes
8 the language, the use of means for coupling said
9 nucleotide precursors to a particular set of
10 discrete cell locations to the exclusion of other
11 discrete cell locations.

12 The Court has construed this portion
13 of Claim 4. I'll just read that quote. "The
14 Court construes this means plus function claim to
15 permit the function to be performed by a mask, a
16 laser typesetter, an I think jet printer, computer
17 controlled printing device, or their
18 equivalents." And that's from the memorandum
19 opinion.

20 Dr. Dahlberg, do you have an opinion
21 as to whether Affymetrix infringes Claim 4 of the
22 '637 patent?

23 A. Yes, I do.

24 Q. What is that opinion?

00407

1 A. My opinion is that they do infringe that
2 claim.

3 Q. Why do you believe that Affymetrix
4 infringes Claim 4 of the '637 patent?

5 A. Because they make their products by the
6 process described in Claim 1, and they use in that
7 process a means for as it says, for coupling the
8 precursors at particular sets of discrete cell
9 locations to the exclusion of other discrete cell
10 locations.

11 Q. What means does Affymetrix use to do
12 that?

13 A. Well, they use a mask.

14 Q. Have you selected any documents to
15 illustrate the basis for your opinion?

16 A. Yes.

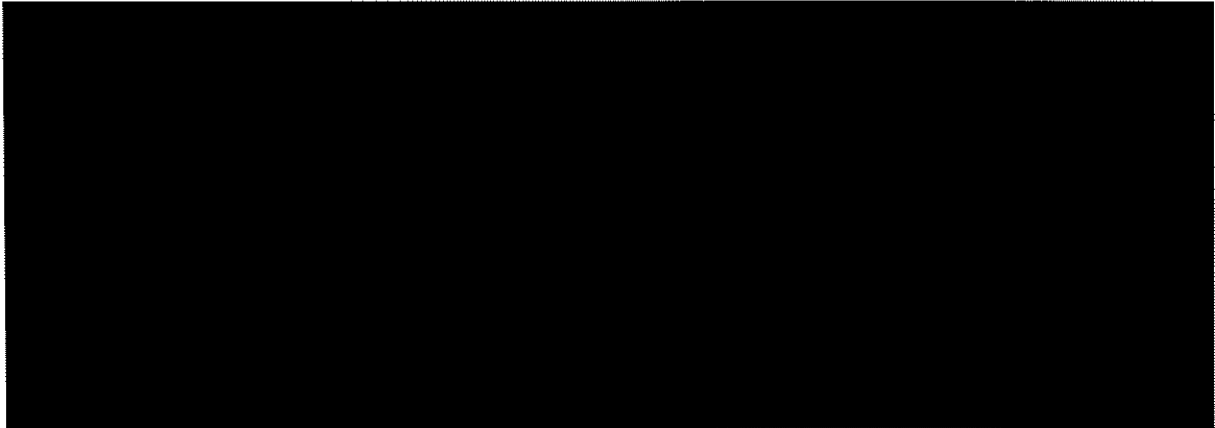
17 Q. What have you selected?

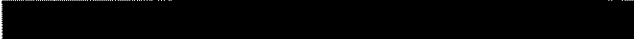
18 A. Well, for one thing, we can look at PTX
19 523, which is an article they've published
20 recently. That is an article that was in the
21 Journal of Nature Genetics, and it was published
22 by Affymetrix, Inc. You can see at the bottom
23 under the authors, that's their affiliation, it
24 says Affymetrix Inc., and these, as far as I

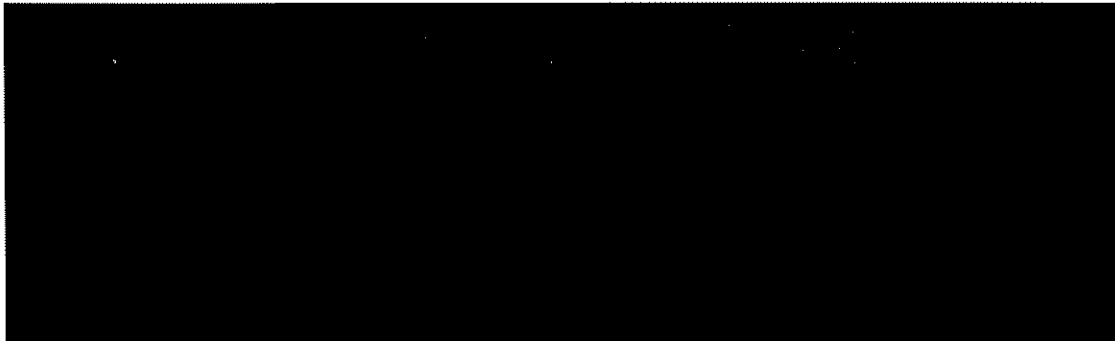
Tab 2

AFFYMETRIX'S RESPONSE TO ILLUMINA'S MOTION *IN LIMINE* #2

Because the parties reached agreement on this motion before it was filed, it should be denied as moot.



As required by Delaware Local Rule 7.1.1, Affymetrix and Illumina met and conferred about the parties' motions in limine before they were filed to see if agreement on any of them could be reached. 



A

REDACTED

Tab 3

AFFYMETRIX'S RESPONSE TO ILLUMINA'S MOTION *IN LIMINE* #3

Illumina's Motion *in Limine* #3 seeks "an order precluding Affymetrix from offering any testimony or evidence that Affymetrix hopes will persuade the jury that Illumina allegedly copied or willfully infringed the patents-in-suit." Illumina Mot. *in Lim.* #3 at 1, D.I. 373. Specifically, Illumina seeks to exclude all evidence that Mark Chee, an inventor on one of the Affymetrix patents-in-suit, left Affymetrix to found Illumina. For the reasons set out below, Illumina's motion should be denied.

Affymetrix agrees that evidence relating solely to willful infringement is a matter for Phase 2 and not Phase 1. *See* Affymetrix Motion *in Limine* No. 1, D.I. 372.¹

Illumina's present motion, however, goes too far and sweeps too broadly.² For example, Illumina seeks to exclude [REDACTED]

[REDACTED]

Dr. Chee is a co-inventor of the '716 patent-in-suit [REDACTED]

[REDACTED]

1

[REDACTED]

2

In addition, Illumina's Motion is vague as to what exactly it seeks to exclude or what Illumina means by "other such inflammatory evidence."

3

Illumina still has not consented to stipulate to ownership of the '716 patent in this first phase, despite the Court's previous ruling on this issue.

[REDACTED]

[REDACTED] These issues

alone show that evidence and testimony relating to Dr. Chee is relevant to the first phase and that Illumina's request should be denied.

Illumina's motion to preclude, however, goes farther. It also seeks to preclude

[REDACTED]

Indeed, under Illumina's all-sweeping proposed exclusion order, [REDACTED]

[REDACTED]

Evidence and testimony about Dr. Chee and other former Affymetrix employees and their work at Affymetrix and Illumina [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Affymetrix submits that such

evidence is relevant to issues in Phase 1 and also that Illumina has failed to meet its burden of showing that evidence relating to Dr. Chee (and other former Affymetrix employees that joined Illumina) is substantially more prejudicial than probative as required by Rule 403.

Accordingly, Affymetrix respectfully submits that Illumina's Motion *in Limine* #3 should be denied.

A



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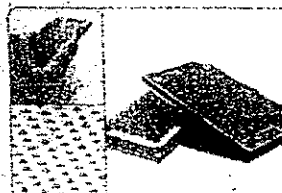
[home](#) > [about illumina](#) > [history](#)

history

Illumina was founded in April 1998 by John Stuepnagel, D.V.M. and Mark Chee, Ph.D. Mark had previously been a genomics "guru" at Affymetrix, while John had been with a venture capital firm called CW Group. While with CW Group, John had uncovered the core technology at Tufts University and negotiated an exclusive license to that technology. The first substantial funding, about \$8.6 million, came in November 1998. Illumina then proceeded to build its staff, secure a facility, and work on development of its core technology and intellectual property portfolio.

Jay Flatley joined the company in October 1999 as President and CEO. Illumina completed a \$28 million Series C financing in December 1999 and we completed our IPO at the end of July 2000, raising just over \$100 million.

Illumina's mission is to develop next-generation tools for the large-scale analysis of genetic variation and function. The understanding of variation and function will be critical to achieving the goal of enabling personalized medicine. The tools that we plan to provide convert the data that's been generated from the human genome sequencing efforts into medically relevant information. That information will correlate genetic variation and function with disease states, improving the ability to discover drugs and allowing diseases to be detected earlier and more specifically.



Our Sonitrac™ Array Matrix accommodates manual or robotic operation.

NEWS & HIGHLIGHTS

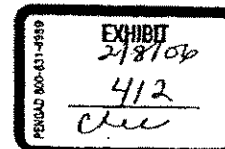
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Plaintiff's
 Trial Exhibit
 PTX 86
C.A. No. 04-901 JJF



AVL 141861

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Tab 4

AFFYMETRIX'S RESPONSE TO ILLUMINA'S MOTION *IN LIMINE* #4

In its Motion *in Limine* #4, Illumina's seeks to preclude Affymetrix from relying on three licenses on the purported ground that "Affymetrix did not produce all related licensing materials, as required under the parties' discovery agreement." Illumina Mot. *in Lim.* #4 at 11. The Court should deny Illumina's motion for two fundamental reasons.

[REDACTED]

I. [REDACTED]

[REDACTED]

[REDACTED] In its Motion *in Limine* #4, Illumina acknowledges that Affymetrix's counsel [REDACTED]

[REDACTED]

[REDACTED] Under the amended Scheduling Order, opening expert reports were due on September 15, 2006. *See* D.I. 333 at 1-2

(signed by the Court on September 6, 2006). On August 11, 2006 – more than a month before expert reports were exchanged – Affymetrix produced [REDACTED]

[REDACTED]

A. Affymetrix Produced [REDACTED]

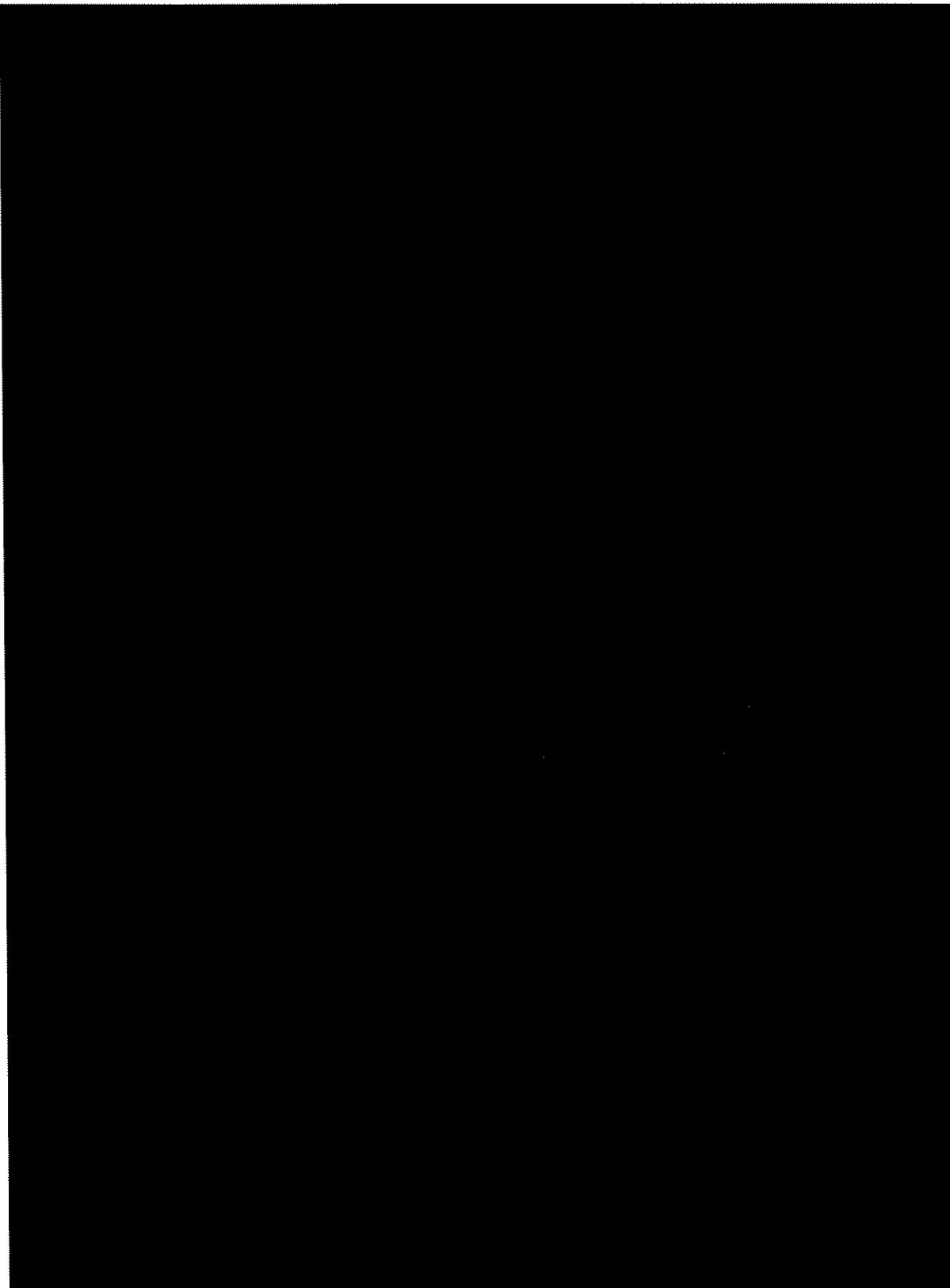
[REDACTED]

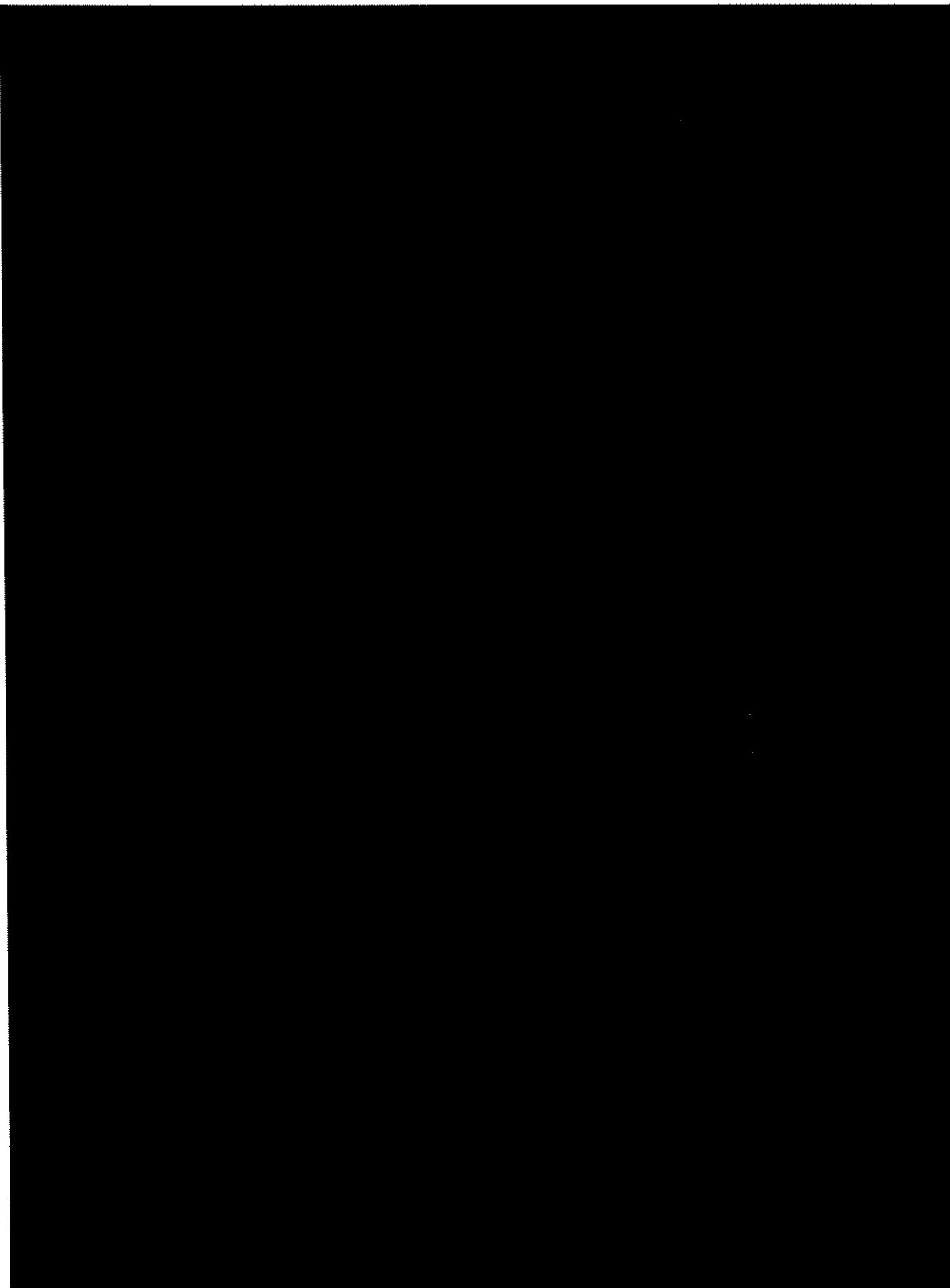
Illumina asserts that Affymetrix did not produce [REDACTED]

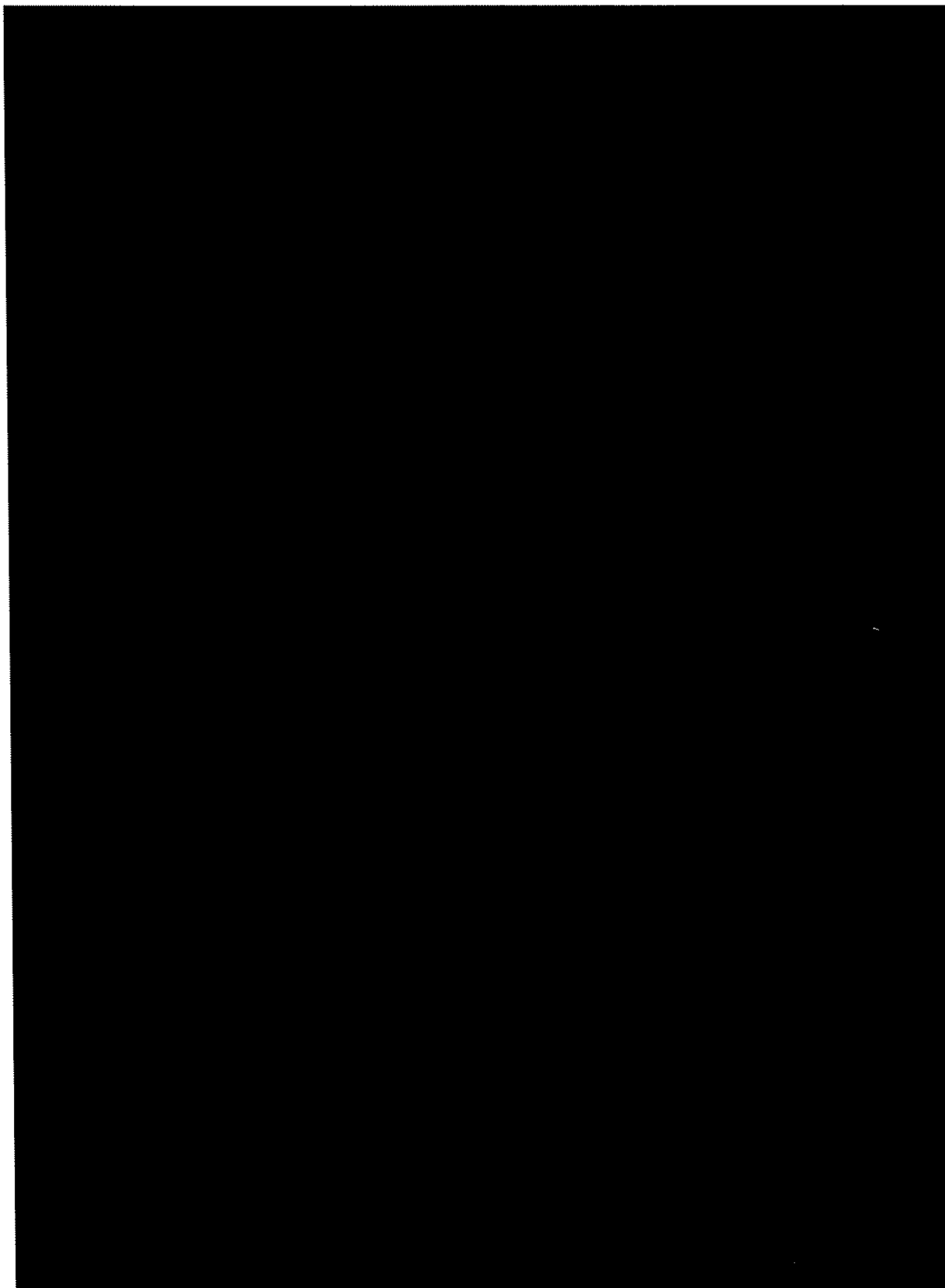
[REDACTED]

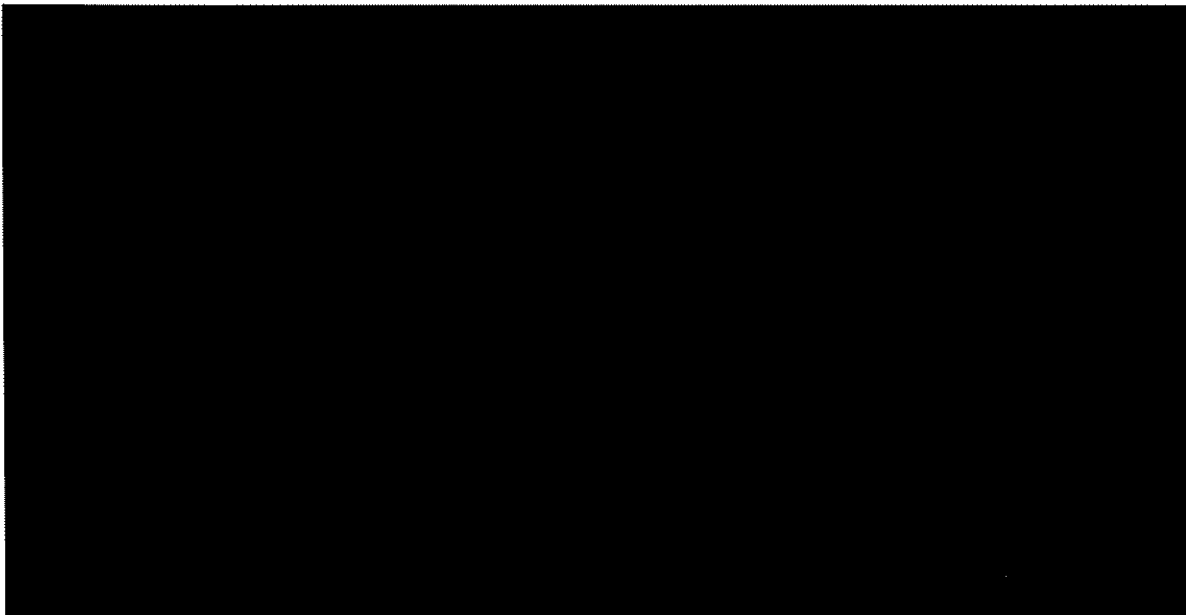
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[REDACTED]



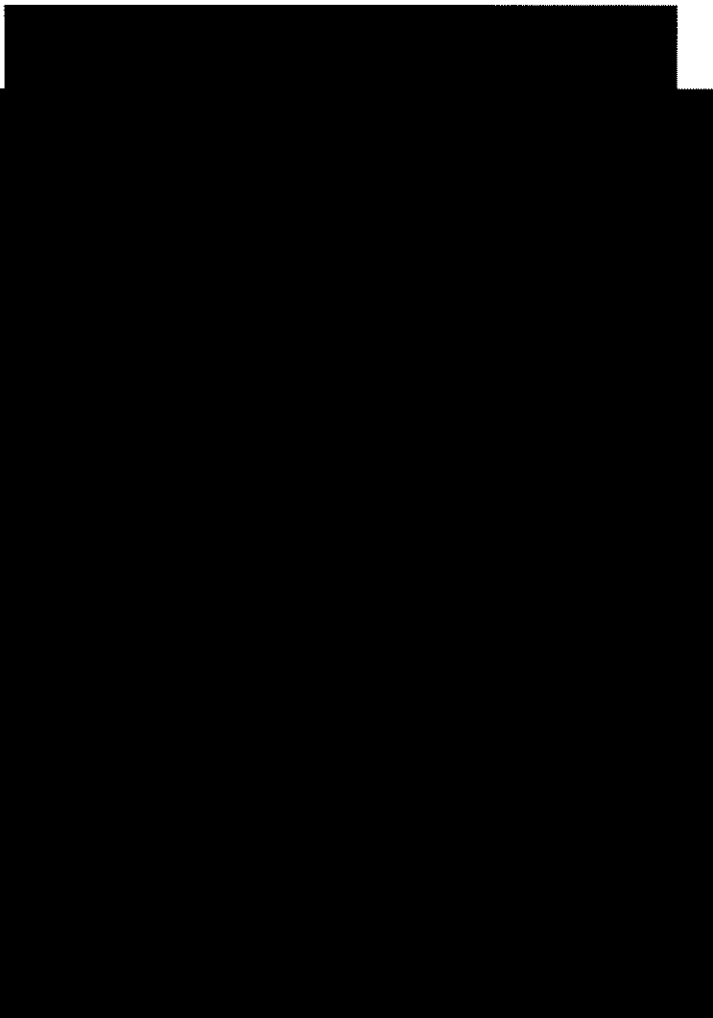


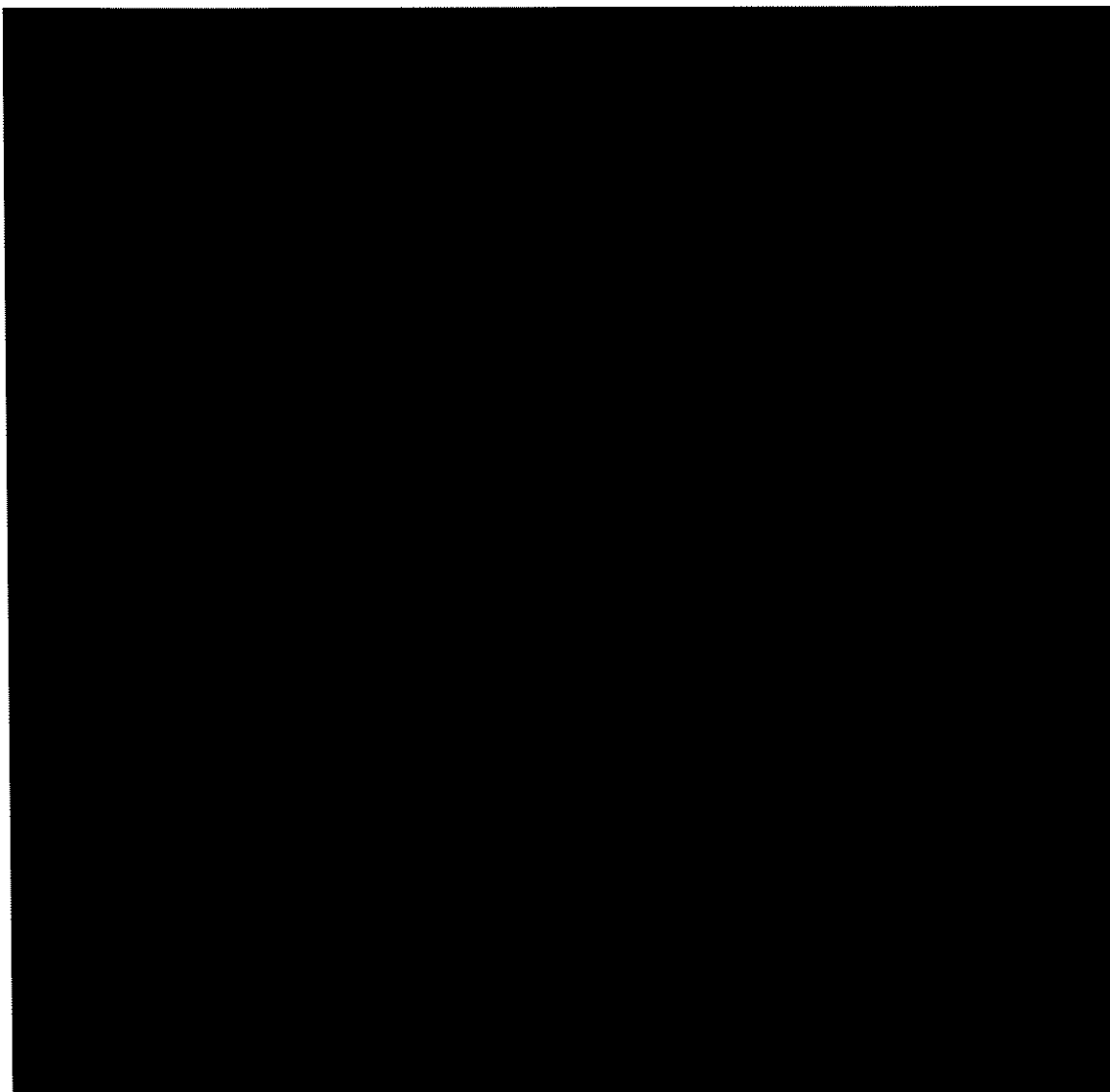




II. ILLUMINA CANNOT SHOW ANY UNFAIR PREJUDICE

Illumina contends that it is





For all the foregoing reasons, the Court should deny Illumina's motion *in limine* #4.

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Tab 5

AFFYMETRIX'S RESPONSE TO ILLUMINA'S MOTION *IN LIMINE* # 5

In its Motion *in Limine* #5, Illumina seeks to preclude Affymetrix's damages expert from [REDACTED]

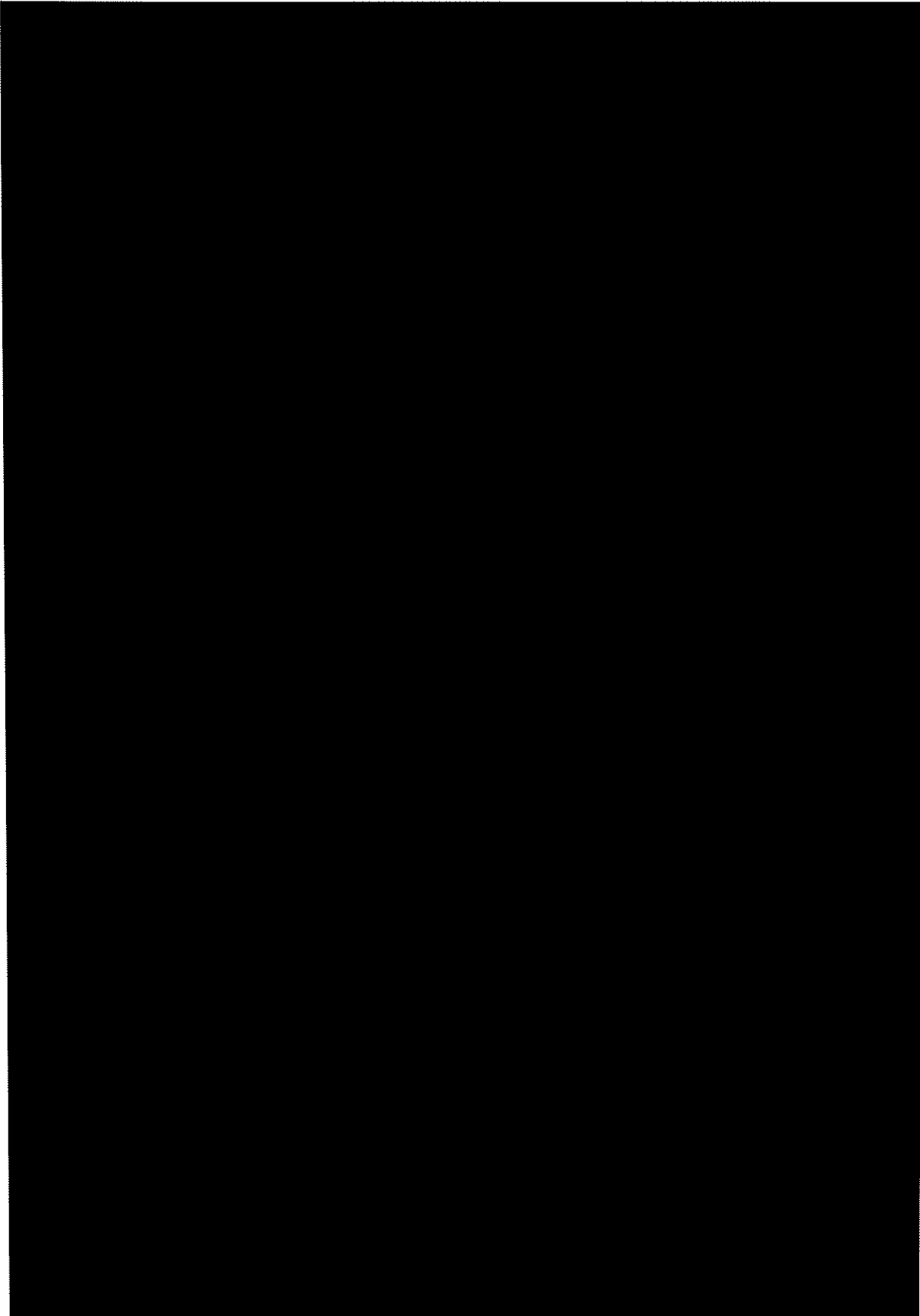
[REDACTED]

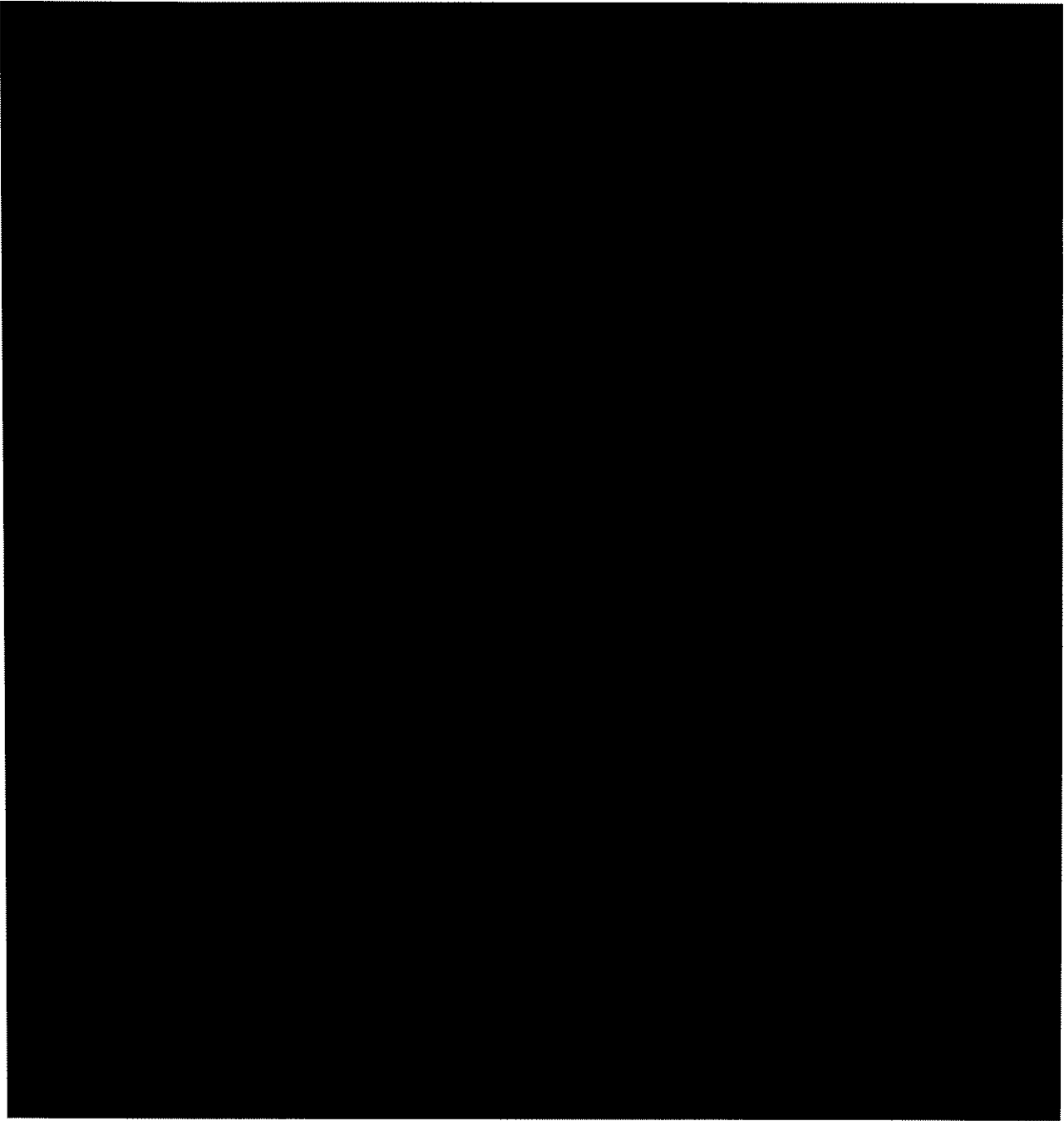
[REDACTED] The Court should deny Illumina's motion because Affymetrix [REDACTED]

[REDACTED]

In forming his opinion as to a reasonable royalty, Affymetrix's damages expert, Dr. Matthew Lynde, [REDACTED]

[REDACTED]

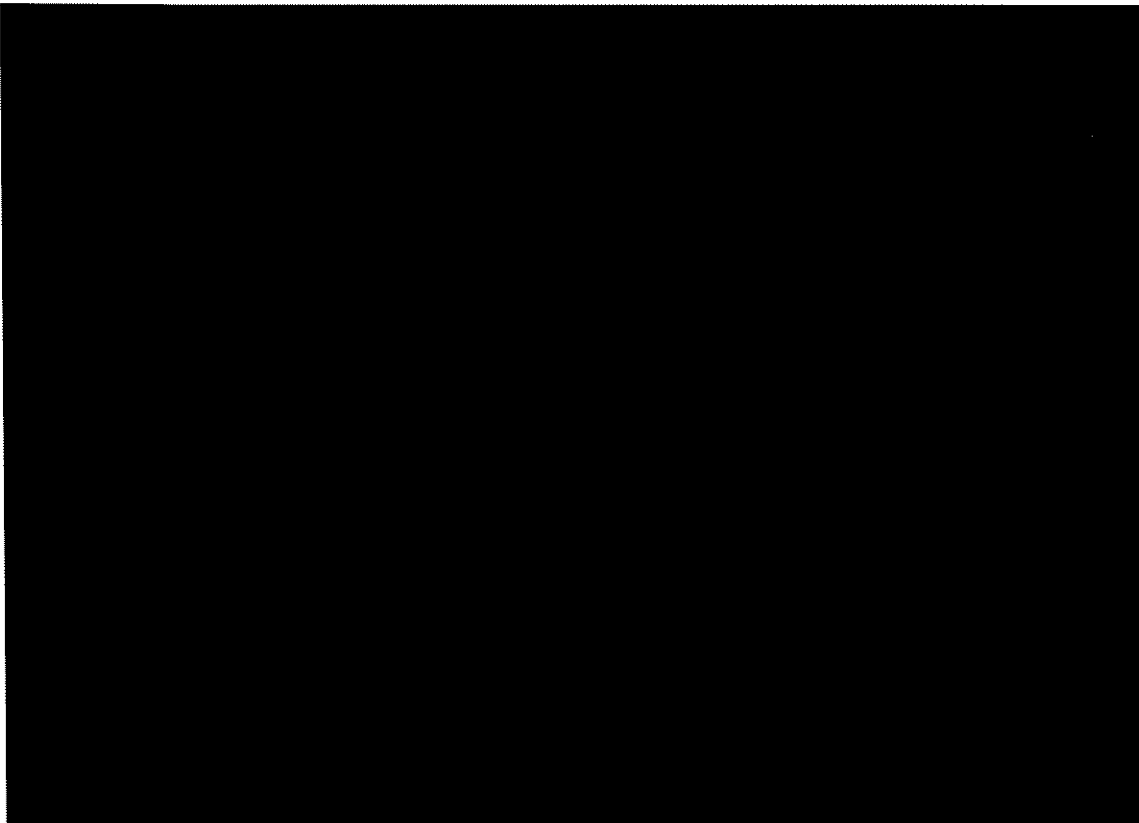




Federal Rule of Evidence 703 governs.

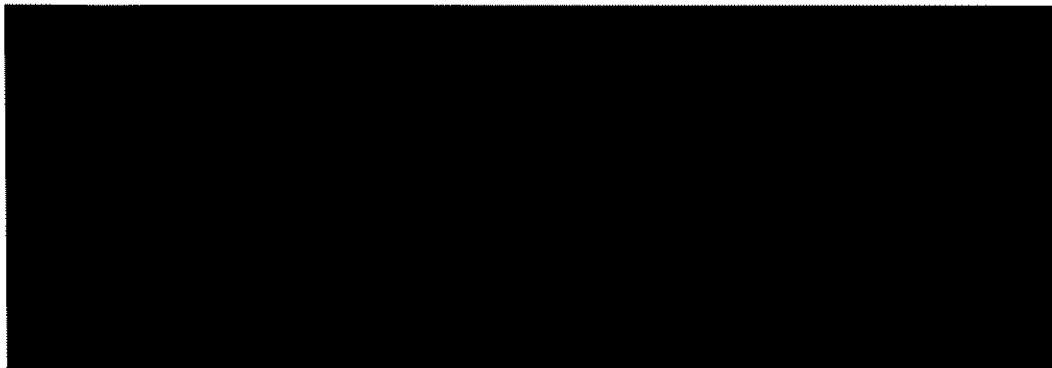
“Rule 703 broadens the acceptable bases for expert testimony by allowing an expert to base an opinion on hearsay and other evidence not admissible in court.” *Ambrosini v. Labarraque, M.D.*, 966 F.2d 1464, 1466 (D.C. Cir. 1992) (*citing* Fed. R. Evid. 703 advisory committee’s note; Jack B Weinstein & Margaret A. Berger, *Weinstein’s*

Evidence ¶ 703[01], at 6-7 (1991)). Under Rule 703, an expert is allowed to base his opinion on facts or data that are “of a type reasonably relied upon by experts in the particular field,” even if the facts or data are not themselves admissible. Fed. R. Evid. 703.



For the foregoing reasons, the Court should deny Illumina’s Motion *in Limine* #5.

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Global Equity Research

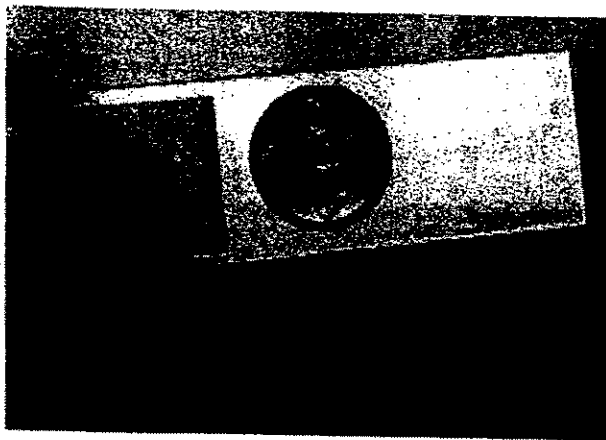
Americas

Biotechnology

Sector Comment

UBS Investment Research

Q-Series®: The DNA Microarray Market



Mega Markets for Microarrays?

■ What is the DNA microarray market opportunity?

DNA microarray technology revolutionized whole genome analysis. Most microarrays are used for gene expression studies, but this market is mature. As new applications in genotyping and molecular diagnostics emerge, key questions for life sciences investors are whether these new markets are real and how fast they can grow.

■ UBS market model used to forecast microarray demand

To address these questions, we built a proprietary model for the microarray market and project demand through 2010. We used interviews with experts and industry participants to define the existing market, and forecast growth based on customer surveys and a review of R&D trends.

■ The market is real, but could be smaller than expected

In our view, the microarray opportunity is real, albeit smaller than some earlier forecasts. We estimate the total microarray market will grow from ~\$875 million in 2005 to ~\$1.6 billion by 2010 (13% CAGR). We see gene expression stabilizing at ~7% growth, while we believe genotyping could be a ~\$500 million market. However, we are cautious on molecular diagnostics.

■ Investment implications

Affymetrix (Neural 2) is the market leader, but execution problems have hurt performance; we present three scenarios and a valuation model for AFFX shares. We also expect Illumina, Agilent, Applied Biosystems, and GE Healthcare to benefit from the DNA microarray market opportunity.

23 January 2006

www.ubs.com/investmentresearch

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ANALYST CERTIFICATION AND REQUIRED DISCLOSURES BEGIN ON PAGE 58

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Plaintiff's
Trial Exhibit
PTX 351
C.A. No. 04-901 JJP

AVI_210588

Introduction

Microarrays Are a Transforming Technology

A transforming technology enables researchers to conduct experiments on a scale that was heretofore unfeasible. For example, polymerase chain reaction (PCR) was the transforming technology in the 1980s. PCR is a method used to amplify and detect minute amounts of nucleic acid sequences (i.e., DNA and RNA) that otherwise could not be detected. PCR is a fundamental molecular tool that has enabled the advancement of molecular biology and genomics research severalfold. With PCR, an unskilled technician, using a few dollars worth of reagents and an instrument called a thermal cycler, can accomplish several weeks' worth of technically sophisticated work in an afternoon. In addition, PCR-based detection methods have become the gold standard in the rapidly growing ~\$2 billion molecular diagnostics industry.

PCR was the transforming technology of the 1980s

In the 1990s, automated DNA sequencing instruments, in particular the Applied Biosystems 3700, were the key transforming technology. With increases in throughput of 1,000-fold or more, automated DNA sequencers freed up resources and accelerated the completion of the first human genome sequencing project years ahead of schedule. Many scientists who saw the power of DNA sequencing subsequently founded genomics and biotechnology companies featuring DNA sequencers as the centerpiece of internal research programs. Despite the fact that there is more DNA being sequenced today than during the prime of the initial human genome project—there are 3 billion base pairs of DNA in the human genome, and the five U.S. human genome centers are currently producing 150 billion base pairs of high-quality sequences per year—sequencing technology has dramatically improved and prices have fallen precipitously. As a result, today the ~\$600 million DNA sequencing market is essentially flat, and Applied Biosystems' growth has suffered. Thus, possession of a transforming technology is no guarantee of robust long-term organic growth.

DNA sequencing was the transforming technology of the 1990s

For this decade, we believe that the key transforming technology is the DNA microarray. With the sequencing of the human genome came the need to develop large-scale methods of molecular analysis. DNA microarrays were among the first technologies to enable whole genome studies. The first application of microarray technology was in the large-scale analysis of gene expression (i.e., determining when, where, and at what level a specific gene is active in a biological sample) for drug target discovery and validation. Previously, researchers used tedious techniques to examine the activities of individual genes in series (i.e., one at a time). In contrast, DNA microarrays can be used to determine the activities of tens of thousands of genes in parallel, in effect testing the whole genome in a single experiment.


Microarrays represent the transforming technology of the 2000s

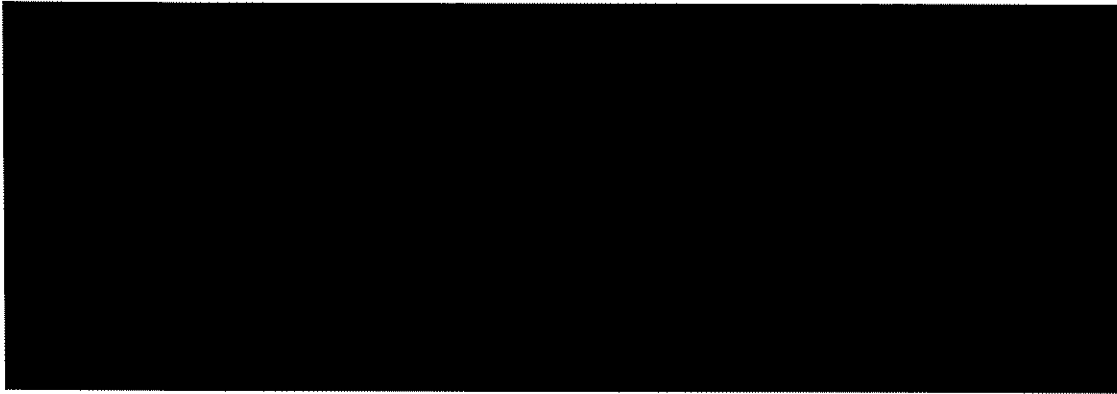
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Tab 6

AFFYMETRIX'S RESPONSE TO ILLUMINA'S MOTION *IN LIMINE* #6

In its Motion *in Limine* #6, Illumina seeks to preclude Affymetrix's damages expert 



This motion *in limine* is now moot. 



Because Affymetrix agrees to Illumina's proposed resolution, Illumina's Motion *in Limine* #6 should be denied as moot.

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2007, I electronically filed the foregoing document using CM/ECF which will send notification of such filing(s) to the following:

Richard K. Herrmann
Morris James LLP

I also certify that copies were caused to be served on March 1, 2007 upon the following in the manner indicated:

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